IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 22, 2009 Session

STATE OF TENNESSEE v. DUDLEY K. BLANKENSHIP

Direct Appeal from the Criminal Court for Davidson County
No. 2007-D-3328 Cheryl A. Blackburn, Judge

No. M2008-01881-CCA-R3-CD - Filed June 30, 2009

A Davidson County jury convicted the Defendant, Dudley K. Blankenship, of one count of vandalism causing more than $1000 in damage, a Class D felony. On appeal, the Defendant contends: (1) the trial court erred when it did not require the State to elect facts to support the conviction; and (2) the evidence is insufficient to sustain his conviction. After a thorough review of the evidence and the applicable authorities, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Jay Norman, Nashville, Tennessee, for the Appellant, Dudley K. Blankenship.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Lacy Wilber, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Bret Gunn, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION
I. Facts and Procedural History

On May 25, 2007, in case number 2007-B-1478, the Davidson County grand jury indicted the Defendant for felony vandalism. The indictment stated that on August 18, 2006, the Defendant, "knowingly did cause damage to or the destruction of real or personal property, to wit: a Ford F150 and a Ford Expedition of Lance Cannon, when [the Defendant] knew he did not have the effective consent of Lance Cannon, the value of which is $1,000 or more but less than $10,000. . . ." The Defendant pled "not guilty" to this charge. On November 30, 2007, in case number 2007-D-3328, the Davidson County grand jury returned a two-count superseding indictment against the Defendant, charging in Count 1 that:

> [O]n divers days in July and August 2006, in Davidson County Tennessee . . . [the Defendant] knowingly did cause damage to or the destruction of real or personal property, to wit: a Ford F150 and a Ford Expedition of Lance Cannon, when [the Defendant] knew he did not have the effective consent of Lance Cannon, the value of which is $1,000 or more but less than $10,000. . . .

In Count 2, the grand jury charged that on August 18, 2006, the Defendant "knowingly did cause damage to or the destruction of real or personal property, to wit: an automobile of Curtis Sutton, when [the Defendant] knew he did not have the effective consent of Curtis Sutton, the value of which is $500.00 or less . . . ."

On December 19, 2007, the State informed the trial court it was dismissing case number 2007-B-1478, the one-count indictment that charged the Defendant with felony vandalism. The State proceeded on the two-count indictment, case number 2007-D-3328.

The Defendant filed a motion to dismiss Count 2 of the indictment in case number 2007-D-3328. He asserted that the indictment charged him with misdemeanor vandalism that occurred more than twelve months before the filing of the indictment. The parties agreed that the motion was well-taken, and the trial court ordered Count 2 dismissed.

At the Defendant's trial on Count 1 of the two-count indictment, the following evidence was presented: Lance Cannon testified that in July and August of 2006 he lived with his wife in a rented condominium, at 2120, East Haven, unit 78, off of Lebanon Pike in Davidson County, Tennessee. The couple owned two cars: a black 2003 F150 pickup truck and a 2003 Ford Expedition. Cannon testified that he regularly parked the pickup in front of the condominium's garage, and his wife parked the Expedition across the street in a parking lot. Cannon recalled that in July of 2006, on a Saturday morning between 3:00 a.m. and 6:00 a.m., his wife awoke him and told him that something that looked like blood was underneath his truck. Cannon went outside and saw red paint was on the driver's side of his truck, including the hood the door, the mirrors, the bed of his truck on the driver's side, and the rim. Cannon called the police and then tried unsuccessfully to remove all the paint.

Cannon then described a second incident that occurred a month after the first incident, saying that he discovered white paint on his pickup truck, including on the hood, the side of his truck, the bed of his truck, the rims and also the back bumper. Cannon said that, on his wife's Expedition, he also found white paint on the driver's side and the back tailgate. He also saw paint on his neighbor's Taurus. Cannon said he again unsuccessfully tried to remove all of the white paint. Shortly thereafter, Cannon found a paint can in the trash can beside his house. Cannon called the police.

Cannon said he did not see any of the vandalism occur, and he had no disagreements with anyone that could have motivated the vandalism. Cannon received an estimate to repair both vehicles, but he did not have them repaired because of the cost of his deductible. Rather, he traded the cars for new vehicles.

On cross-examination, Cannon testified that he did not know the Defendant in July or August of 2006. He agreed that he did not know exactly what time the vandalism occurred, he only knew that the vandalism occurred between the time that he went to bed and the time that he awoke. Cannon said he bought both vehicles in 2005, and he paid approximately $30,000 for each of them.

Brenda Cannon, Lance Cannon's wife, also recalled these two incidents of vandalism. She said that she was the first to discover the red paint on the F150 pickup truck. She was leaving for an appointment when she discovered red paint on the windshield, all over the hood, and on the side of the truck from the cab to the bed of the truck. She and her husband attempted to remove the paint, but it was "so thick and dried" that after eight hours of working some paint remained. Approximately one month later, Brenda Cannon looked out the window and saw that there was white paint on the pickup truck. When she went outside to investigate further, she saw that her Expedition, which was parked across the street, also had white paint on it. The Taurus parked next to her SUV was also covered with white paint. She and her husband again tried to remove the paint but were unsuccessful.

Curtis Sutton testified he was a neighbor of the Cannons in August of 2006. He recalled that, on August 18, 2006, he discovered white paint on the trunk and the passenger side of his Mercury Sable. He also saw paint on the car parked next to his. Sutton testified he immediately took his car to the car wash and was able to wash most of the paint off his car. Sutton testified, however, that the paint that had dripped into the lip of the trunk and into the door remained. Sutton said the Cannon's car had been previously vandalized with red paint. On cross-examination, Sutton testified that the paint on his car was on the trunk and the passenger's side, which was the side closest to the Expedition.

John Horton testified that, in August of 2006, he lived at 2120 Lebanon Pike, and he knew the Cannons, who lived across the street. Horton said that, at around 3:00 a.m. on August 18, 2006, he heard a noise outside. When he looked outside he noticed a truck in the street underneath a light pole. He saw the Defendant come around the truck and then damage Cannon's car with white paint. Horton also saw the Defendant throw the paint can into a dumpster. Horton described what the Defendant wore during this incident and how the Defendant drove away in a silver Toyota pick-up. Later that morning, Horton discovered other vehicles bearing paint. Horton testified that he was later shown a picture of the Defendant, whom he identified without hesitation as the man he saw splash paint on the vehicles.

On cross-examination, Horton testified that he was in his living room watching television when he heard the noise outside. Horton agreed that he had previously testified he saw someone "sloshing" paint on the hood of a Ford F150. Horton said that he did not wake the Cannons to tell them what he had seen. He said Lance Cannon borrowed his pressure washer the next morning, and the truck appeared clean thereafter. While Horton did not see the Defendant throw the gallon of paint in the dumpster, he heard the dumpster open and close. Horton conceded that he did not get the license plate number of the truck the Defendant was driving.

Gina Blakenship, the Defendant's ex-wife, testified that she purchased the condominium rented by the Cannons after her divorce from the Defendant. She lived in the condominium after she first purchased it but later rented it to the Cannons. Blakenship testified that she filed for a divorce from the Defendant, and she described him as a jealous person. She said that, at the time of this incident, she had not told the Defendant that she had moved out of the condominium. She provided a picture of the Defendant to see if Horton could identify him as the person that vandalized the Cannons' vehicles.

On cross-examination, Blakenship testified that she and the Defendant were divorced by mutual agreement in February of 2005. She moved into the condominium after the divorce, and she never told the Defendant she moved into the condominium. On redirect examination, Blakenship testified that, after the divorce, the Defendant called her at work and left her "very ugly" messages. She said she had to change her cell phone number because he would leave "ugly" messages on it about her and her daughters, who were her children from a previous marriage.

Mark Harris testified he worked at Whaley's Paint and Body Shop, where Lance Cannon brought his vehicles in 2006 to receive an estimate for their repair. Harris said that he provided Cannon an estimate of $2426.45 to repair the damage to the Ford F150. He said that the repair would include refinishing the entire right side, replacing several plastic parts, and replacing moldings. Harris testified he provided Cannon an estimate of $2200.68 to repair the damage to the Ford Expedition, explaining that such a repair which would also involve replacing several parts. On cross-examination, Harris testified he did not recall the color of the paint that needed to be removed.

Detective Jeff Sells with the Metro Nashville Police Department testified that this vandalism case was assigned to him after it was originally assigned to another officer. The original report included a description of a suspect vehicle and a suspect. The report stated the suspect was "male, white, bald, five nine, about 260" and the suspect vehicle was a "silver Toyota pick-up." The report also indicated that paint cans were placed in a dumpster or trash can. After a witness identified the Defendant's photograph as the man who vandalized the Cannons's vehicles, Detective Sells determined that the Defendant matched the description given by the witness. He also determined that a silver Toyota Tacoma was registered to the Defendant. He then swore out a warrant for the Defendant's arrest.

Detective Sells said that upon further investigation he learned that the Cannons had previously complained of vandalism. He also said that this was not the type of case where fingerprinting of the paint cans would be warranted.

On cross-examination, the detective conceded that the report may have indicated that the suspect was in his mid thirties. The detective said he never personally interviewed Horton.

The Defendant testified that he had worked for his current employer, Yellow Freight in West Nashville, for ten years. He said he did not put paint on the Cannons's vehicles, and he did not know either of the Cannons. The Defendant said that he and his ex-wife divorced in 2005,

and he did not know where she lived after they separated. He emphasized that they both agreed to the divorce. He denied that he had ever threatened his wife. The Defendant said he did not know why someone would throw paint on the Cannons's vehicles.

On cross-examination, the Defendant testified that his ex-wife lied about him calling her and leaving her "ugly messages." He said he did not know why she had lied because their separation and divorce were amicable.

Based upon this evidence, the jury convicted the Defendant of one count of vandalism causing more than $1000 in damage, a Class D felony.

II. Analysis

On appeal, the Defendant contends: (1) the trial court erred when it did not require the State to elect facts upon which it was relying to support the conviction; and (2) the evidence is insufficient to sustain his conviction.

A. Election

The Defendant contends that the trial court erred when it denied his request to dismiss the indictment as duplicitious or, in the alternative, to require the State make an election as to which evidence it was relying on to support the vandalism conviction. He asserts that the State offered proof of acts in July 2006 and August 2006 and should have, therefore, been required to elect facts to support the one-count indictment. The State concedes that the trial court erroneously held that the Defendant had waived this issue, but it argues that the error was harmless.

At the close of the State's proof, the Defendant moved the court to dismiss the indictment as duplicitious or to require the State to elect facts upon which it was relying when seeking a vandalism conviction. The trial court ruled:

> Let's deal with this issue about duplicitous. That is, [the Defendant] is charged with one offense of vandalism on diverse days of July and August for there had been two different days.
>
> Now, the argument that [Defense Counsel] is making has to do with duplicity, and a duplicitous indictment charges two or more separate crimes on a single count of an indictment, as contrasted to multiplicity where it is – refers to the improper charging of the same offense in more than one count of the indictment.
>
> So anyway we are talking about an allegation of duplicity where you have only one count and there are apparently multiple acts. Well, then you have the statute 40-13-206, which talks about alternative allegations. "When the offense may be committed by different forms or by different means or with different intents, the forms, means, or intents may be alleged in the same count. In the

> alternative when an acts is criminal, if producing different results, the different results may be charged in the same count in the alternative." Which would probably be it, 14-13-206B.
>
> Now, this is the problem. First of all, it's just one count. He's not going to be convicted of multiple offenses. But most particularly, [Defense Counsel], the problem you have is that the issue is waived. Because by proceeding to trial without objection the defendant waives all challenges to the validity of the indictment where it talks about the prohibition against duplicity. . . . In other words, you should have raised this prior to trial. I'm finding it's not duplicitous anyway. You should have raised it. Your motion is denied.

The State posited that it must only prove that the Defendant committed over $1000 of damage to the Cannons' vehicles and that the indictment was therefore valid. The State argues that an election was not necessary.

Our Supreme Court has consistently held that the prosecution must elect the facts upon which it is relying to establish the charged offense if evidence is introduced at trial indicating that the defendant has committed multiple offenses against the victim. *State v. Johnson*, 53 S.W.3d 628, 630-31 (Tenn. 2001) (citing *State v. Kendrick*, 38 S.W.3d 566, 568 (Tenn. 2001); *State v. Brown*, 992 S.W.2d 389, 391 (Tenn. 1999); *State v. Walton*, 958 S.W.2d 724, 727 (Tenn. 1997); *Tidwell v. State*, 922 S.W.2d 497, 500 (Tenn. 1996); *State v. Shelton*, 851 S.W.2d 134, 137 (Tenn.1993)). The election requirement safeguards the defendant's state constitutional right to a unanimous jury verdict by ensuring that jurors deliberate and render a verdict based on the same evidence. *Id.* at 631 (citing *Brown*, 992 S.W.2d at 391). A jury's verdict is not unanimous when the jurors find the same elements of a particular crime based on different facts and offenses; the jurors must "deliberate and render a verdict based on the same evidence." *State v. Johnson*, 53 S.W.3d 628, 631 (Tenn. 2001). Issues of jury unanimity can arise when a single offense is charged, but there is evidence presented of different acts with each act being sufficient to support a conviction for the charged offense. The doctrine is applied to ensure that some jurors do not convict on one offense and other jurors on another, i.e. a patchwork verdict. *Shelton*, 851 S.W.2d at 137. When the evidence does not establish that multiple offenses have been committed, however, the need to make an election never arises. *State v. Adams*, 24 S.W.3d 289, 294 (Tenn. 2000).

This right to a unanimous verdict has been characterized by this Court as "fundamental, immediately touching on the constitutional rights of an accused . . . ." *Burlison v. State*, 501 S.W.2d 801, 804 (Tenn. 1973). An election issue is not waived by the failure to raise it prior to trial. *See State v. Hoxie*, 963 S.W.2d 737, 741 (Tenn. 1998). Similarly, the failure to raise an election issue in a motion for new trial or on appeal does not preclude appellate review because the failure of the State to elect offenses when the proof requires an election is considered an error of constitutional magnitude and will be considered as plain error. *State v. Larry Darnnell Pinex*, No. M2007-01211-CCA-R3-CD, 2008 WL 4853077, at *6 (Tenn. Crim. App., at Nashville, Nov. 6, 2008) (citing *State v. Kindrick*, 385 S.W.3d 566 (Tenn. 2001)), *perm. app. denied* (Tenn. May 11, 2009). We conclude, therefore, in the case presently before us the trial court erred

when it held the Defendant had waived this issue. Accordingly, we must address the merits of the Defendant's election issue.

The Defendant argues that the trial court erred when it failed to require that the State elect facts upon which it was relying to establish the charged offense. We conclude that the trial court did not err in this regard. The Defendant correctly notes that the victim testified that his truck had been splashed with paint twice: once, in July 2006, with red paint and once, in August 2006, with white paint. The victim testified that, when his truck was splashed with white paint in August 2006, his wife's SUV and a neighbor's vehicle were also splashed with white paint. The State only offered proof of the Defendant's identity as the perpetrator of the August 18, 2006, incident involving the white paint, and it only offered proof of the monetary amount of the damage to the vehicles from the August 18, 2006, incident based on a repair estimate dated August 25, 2006. Therefore, the evidence presented did not establish that multiple offenses were committed by the Defendant, and consequently, the need to elect facts never arose. *See Adams*, 24 S.W.3d at 294. The Defendant is not, therefore, entitled to relief on this issue.

B. Sufficiency of Evidence

The Defendant next contends that the evidence presented is insufficient to sustain his conviction because the State only offered circumstantial evidence of the Defendant's identity. The State notes that a witness, Horton, identified the Defendant as the person who splashed paint on the Cannons's vehicles on August 18, 2006. Horton, the State points out, identified both the Defendant's photograph shortly after the incident and the Defendant in person at trial.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see* Tenn. R. App. P. 13(e), *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.w.3d 389, 392-93 (Tenn. Crim. App. 1999). A conviction may be based entirely on circumstantial evidence where the facts are "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." *State v. Smith*, 868 S.W.2d 561, 569 (Tenn. 1993). In such cases, however, the facts must be "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." The jury decides the weight to be given to circumstantial evidence, and "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury." *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citations omitted).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn.

1956). "Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 479 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1996) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000). Importantly, the credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the evidence are matters entrusted exclusively to the jury as the trier of fact. *Bland*, 958 S.W.2d at 659.

Identity of the perpetrator is an essential element of any crime. *State v. Lindsey*, 208 S.W.3d 432, 443 (Tenn. Crim. App. 2006). The reliability of an in-court identification depends on the totality of the circumstances, "including the opportunity of the witness to view the offender at the time of the crime, the witness's degree of attention, the accuracy of the prior description of the offender, the level of certainty of the witness at the confrontation, and the length of time between the crime and the confrontation." *State v. Beal*, 614 S.W.2d 77, 82 (Tenn. Crim. App. 1981) (citing *Neil v. Biggers*, 409 U.S. 188, 199 (1972); *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *Rippy v. State*, 550 S.W.2d 636, 639-40 (Tenn. 1977)). The identification of the defendant as the person who committed the crime is a question of fact for the jury. *See State v. Strickland*, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993). The credible testimony of one identification witness is sufficient to support a conviction if the witness viewed the accused under such circumstances as would permit a positive identification to be made. *State v. Radley*, 29 S.W.3d 532, 536 (Tenn. Crim. App. 1999) (citing *Strickland*, 885 S.W.2d at 87-88).

In the case under submission, we conclude that Horton's identification of the Defendant, along with the other circumstantial evidence, was sufficient to prove the Defendant's identity. Horton noticed a truck in the street underneath a light pole. He saw the Defendant come around the truck and then damage Cannon's vehicle with white paint. Horton also saw the Defendant

throw the paint can into a garbage can. Horton described what the Defendant was wearing at the time of this incident and testified the Defendant got into a silver Toyota pick-up and drove away. An investigator testified that a sliver Toyota pick-up truck was registered to the Defendant. Further, the Defendant's ex-wife testified that she owned the condominium where the Cannons's lived and that the Defendant had left her "ugly" messages on her cell phone, circumstantial evidence tying the Defendant to the Cannons's address. All the evidence together is sufficient to prove the Defendant's identity as the perpetrator of this offense. He is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and applicable authorities, we affirm the trial court's judgment.

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ROBERT W. WEDEMEYER, JUDGE